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No. 1036

In the Supreme Court of the United States

OCTOBER TERM, 1967

JULIUS C. MYERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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We respectfully invite the attention of the Court to the following facts which demonstrate that the petition was filed out of time:

Petitioner seeks review (Pet. 1) of the order of the Court of Claims, entered on February 10, 1967, dismissing his petition on the ground that he had failed to exhaust his administrative remedy. No petition for a writ of certiorari was filed in this Court within the 90-day period prescribed by 28 U.S.C. 2101(c) for invoking the jurisdiction of this Court on writ of cer-

tiorari. Nor was an extension of time sought before this period expired on May 11, 1967. Accordingly, the petition for a writ of certiorari, filed on January 18, 1968, was untimely.

This conclusion is not affected by the fact that, on August 25, 1967, petitioner filed a motion for relief under Rule 69(b) of the Rules of the Court of Claims,[1] which was denied on October 13, 1967. In

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[1] Rule 69(b) provides: Relief from judgment or order.

Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.; Response: On motion conforming to Rule 11 and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 68(c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. A motion under this paragraph (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The relief provided by this rule shall be in addition to the relief available to the United States under Rule 68(a)(2). A response to a motion under this paragraph may be filed within 15 days after a motion is served.

applying for, and obtaining, an order from the Chief Justice on January 15, 1968, extending the time for the filing of a petition for a writ of certiorari to and including January 27, 1968, petitioner apparently proceeded on the erroneous assumption that the period specified in 28 U.S.C. 2101(c) did not commence to run until his post-judgment motion was denied. But Rule 69(b) explicitly provides that "[a] motion under this paragraph (b) does not affect the finality of a judgment or suspend its operation". Thus, a motion, like petitioner's, to obtain relief from a "final judgment" under that rule does not operate to suspend the running of the certiorari period.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1968.

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